No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

BEST AVAILABLE COPY

No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Colorado for Family Values (CFV), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action in order to present arguments stating why the petitioners' request should be granted.

The reason for requesting this action is based on Rule 10.1(c) of the Supreme Court of the United States. CFV spent thousands of dollars and numerous hours in obtaining the passage of the Colorado Constitutional Amendment at issue. It is in a unique position to illustrate the gravity of the Colorado Supreme Court's decision and its national significance.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

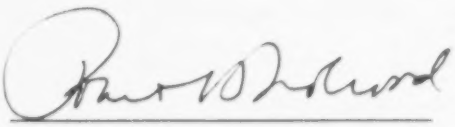
Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Martina Navratilova, Priscilla Inkpen, John Miller, and Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: the City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
Representing: the City of Boulder.
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: the City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.



Robert K. Skolrood
Attorney for Amicus Curiae

The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242

No. 93-453

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

Robert K. Skolrood
Counsel of Record
Barry C. Hodge, Esquire
The National Legal Foundation
6477 College Park Square
Suite 306
Virginia Beach, VA 23464
(804) 424-4242
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ..... viii-xii

INTEREST OF AMICUS CURIAE 1

ARGUMENT

I. The Colorado Supreme Court Usurped Federal Judicial Power 2

II. The Colorado Supreme Court Violated The Standards Authoritatively Imposed By This Court For The Recognition Of A Fundamental Right 5

A. The Fundamental Rights Cases Relied Upon By The Court Below Are Irrelevant To This Case 6

B. The Court Below Extended The *Hunter* Doctrine Beyond Suspect Classification In Contravention Of This Court's Explicit Instructions 7

C. The Decision Of The Colordo Supreme Court Paralyzes The Sovereignty Of The People Of The State Of Colorado 10

III. This Fundamental Right To Participate Equally In The Political Process Will Render Suspect Every Legitimate Limitation Upon The Power Of The Legislature 12

IV. The Judgment Of The Colordo Supreme Court Is Final 16

V. Conclusion 18

TABLE OF AUTHORITIES

Cases ..... **Page(s)**

American Federation of Labor v. Reilly,
155 P.2d 145 (Colo. 1944) 4

American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n,
419 U.S. 215 (1974) 16

Arthur v. City of Toledo, Ohio,
782 F.2d 565 (6th Cir. 1986) 9, 11

Bowen v. Gilliard,
483 U.S. 587 (1987) 14

Bowers v. Hardwick,
478 U.S. 186 (1986) 4, 5, 10

Construction & Gen. Laborers' Union, Local 438 v. Curry,
371 U.S. 542 (1963) 17

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 16

Dunn v. Blumstein,
405 U.S. 330 (1972) 6, 13

Eastlake v. Forest City Enter., Inc.,
426 U.S. 668 (1976) 11

Evans v. Romer,
854 P.2d 1270 (Colo. 1993) 5, 6, 7, 9, 12, 14

Flores v. Pierce,
617 F.2d 1386 (9th Cir. 1980),
cert. denied, 449 U.S. 875 (1980)..... 9

Gordon v. Lance,
403 U.S. 1 (1971)..... 7, 8, 9, 11, 13, 14, 15

Habron v. Epstein,
412 F.Supp. 256 (D.Md. 1976),
aff'd, 429 U.S. 802 (1976)..... 9

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966)..... 6

High Tech Gays v.
Defense Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990),
reh'g denied, 909 F.2d 375 (1990)..... 15, 16

Hunter v. Erickson,
393 U.S. 385 (1969)..... 7, 8, 9, 10, 11, 12, 14

James v. Valtierra,
402 U.S. 137 (1971)..... 7, 8, 9, 11, 12, 13

Jefferson v. Hackney,
406 U.S. 535 (1972)..... 13

Kramer v. Union Free School. Dist. No. 15,
395 U.S. 621 (1969)..... 6

Lucas v.
Forty-Fourth Gen. Assembly of Colo.,
377 U.S. 713 (1964)..... 6

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816)..... 2, 3

McKee v. City of Louisville,
616 P.2d 969 (Colo. 1980)..... 11

Mills v. State of Alabama,
384 U.S. 214 (1966)..... 17

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981)..... 4

Mobile v. Bolden,
446 U.S. 55 (1980)..... 11, 13

National Gay Task Force v.
Board of Educ.,
729 F.2d 1270 (10th Cir. 1984),
aff'd, 470 U.S. 903 (1985)..... 16

North Carolina v. Butler,
441 U.S. 369 (1979)..... 4

Oregon v. Hass,
420 U.S. 714 (1975)..... 4

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971)..... 17, 18

Parker v. Mandell,
344 F.Supp. 1068 (D.Md. 1972)..... 9, 14

Pennekamp v. Florida,
328 U.S. 331 (1946)..... 3

People v. Berger,
521 P.2d 1244 (Colo. 1974)..... 4

People v. Western Union Tel. Co.,
198 P. 146 (Colo. 1921)..... 3

Pope v. Atlantic Coast Line Railroad Co.,
345 U.S. 379 (1953) 17, 18

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945)..... 16

Reynolds v. Sims,
377 U.S. 533 (1964)..... 6

San Antonio Ind. School Dist. v. Rodriguez,
411 U.S. 1 (1973)..... 5, 6, 11

Smith v. Farr,
104 P. 401 (Colo. 1909)..... 4

Steffan v. Cheney,
780 F.Supp 1 (D.D.C. 1991)..... 15, 16

Washington v. Seattle School District,
458 U.S. 457 (1982)..... 7, 8, 9, 11

Wesberry v. Sanders,
376 U.S. 1 (1964)..... 6

Whitcomb v. Chavis,
403 U.S. 124 (1971)..... 13

Wilcox v. People,
104 P. 408 (Colo. 1909)..... 4

Williams v. Rhodes,
393 U.S. 23 (1968)..... 6

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989),
cert. denied, 494 U.S. 1003 (1990)..... 15

Wuebker v. James,
58 N.Y.S.2d 671 (Schenectady County Ct. 1944)..... 4

CONSTITUTIONS AND STATUTES..... Page(s)

U.S. CONST. art. III, § 1..... 2

U.S. CONST. art. III, § 2, cl. 2..... 3

U.S. CONST. art. VI, cl. 2..... 2

U.S. CONST. art. VI, cl. 3..... 3

28 U.S.C. § 1257(a)..... 17

COLO. CONST. art. II, § 1..... 10

COLO. CONST. art. II, § 2..... 10

COLO. CONST. art. II, § 30b..... 5, 11, 18

COLO. CONST. art. V, § 1..... 11

COLO. CONST. art. XII, § 8..... 3

COLO. REV. STAT. ANN. § 24-12-101 (West 1988)..... 3

COLO. REV. STAT. ANN. § 24-12-102 (West 1988)..... 3

INTEREST OF AMICUS

Colorado for Family Values (CFV) is the grassroots organization which secured the passage of Amendment 2. Since CFV gathered approximately 85,000 signatures, spent thousands of dollars, and invested hundreds of hours educating the public about Amendment 2, it is interested in the continued vitality of the Amendment. CFV continues to educate the public concerning special rights.

CFV desires to maintain the integrity of our constitutional government, namely the sovereignty of the people. States have plenary power enabling them to pass a wide variety of laws impacting citizens. CFV is interested in protecting the rights of the citizens of Colorado who have expressed their will in Amendment 2.

The National Legal Foundation assisted in drafting Amendment 2 and participated as amicus curiae in this litigation at the state court level. The Foundation has participated as amicus curiae in several federal and state cases and has served as lead counsel in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for amicus curiae is Robert K. Skolrood. He is licensed to practice in Illinois, Oklahoma, Virginia, the District of Columbia, the United States Supreme Court, as well as numerous U.S. Circuit Courts of Appeal and District Courts.

I. The Colorado Supreme Court Usurped Federal Judicial Power

The judicial power of the United States is vested in this Court:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1.

State judges are bound by the U.S. Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), it has been established that state courts do not have federal judicial power but rather have only a duty to apply the federal constitution:

> It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment . . . .
>
> . . . .
>
> . . . In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally *transcend their authority*, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible

> force than for giving it to the acts of the other co-ordinate departments of state sovereignty.

Martin, 14 U.S. at 340, 344 (emphasis added).[1]

The justices of the Colorado Supreme Court are required to take an oath or affirmation by the U.S. Constitution,[2] and by taking this oath or affirmation,[3] they acknowledge their duty to apply the federal constitution. Even the court below has recognized this duty.[4] The Colorado Supreme Court justices have no federal judicial power and thus do not have the final say on issues concerning the federal constitution.[5] They have only a duty to apply that constitution.

Out of this duty arises an obligation to obey authoritative decisions of this Court:

> [W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free

---

1 *See also*, *Martin*, 14 U.S. at 338-42.

2 "The . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. CONST. art. VI, cl. 3.

3 COLO. CONST. art. XII, § 8, COLO. REV. STAT. ANN. § 24-12-101 and § 24 12-102 (West 1988) provide that a Colorado state judge shall either swear or affirm that he will "support the constitution of the United States and of the state of Colorado . . . ."

4 *See People v. Western Union Tel. Co.*, 198 P. 146 (Colo. 1921) (in deciding whether a state trial court judge could declare a state statute in violation of the federal constitution (in light of the fact that Colorado had a constitution provision that allowed only the state supreme court to resolve such issues) the court, relying both on Article VI, clause 2 of the U.S. Constitution and on a state judge's oath, stated: "The answer is that the trial judge was bound by the mandate of the federal Constitution to *apply that instrument* upon all proper occasions and to hold it to be the supreme law of the land . . . ."). *Western Union Tel. Co.*, 198 P. at 148 (emphasis added).

5 U.S. CONST. art. III, § 2, cl. 2 (appellate jurisdiction of the U.S. Supreme Court). *See Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (stating that the Constitution had imposed upon it the final authority to determine the meaning and application of the "words of that instrument" in contexts requiring the resolution of judicial issues and that when the highest court of a state had reached a decision on such an issue the Court would give respectful attention "to its reasoning and conclusion" but that its authority was not final).

> to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981) (citation omitted).[6]

The Colorado Supreme Court has acknowledged this obligation[7] and other state appellate courts have as well.[8]

Despite this duty and its attendant obligation, the Colorado Supreme Court ignored its lack of federal judicial power and recognized a novel fundamental right not based in the language of the Constitution and one which has never been recognized by this Court. The court below did so in the face of a sovereign act of the people of the State of Colorado. The means by which this was done has set a dangerous precedent. The judges of the Colorado Supreme Court should be reminded of Justice White's warning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), regarding the discovery of new fundamental rights:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

---

6 *See also, Oregon v. Hass*, 420 U.S. 714, 719 (1975); *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

7 *See American Federation of Labor v. Reilly*, 155 P.2d 145, 148 (Colo. 1944) (Even the Colorado Supreme Court itself acknowledges that "[t]he Supreme Court of the United State is the final arbiter in the field of Federal constitutional law and its decisions as to the meaning and scope of a constitutional provision bind state judges." In *Reilly*, before deciding whether a state trial judge had properly held that a state statute was repugnant to the federal constitution, the court announced: "In reaching its decision on the points now in consideration the trial court *properly relied* upon the pronouncements of the highest tribunal in our nation, which we think sustain the conclusion reached." *Id.*) (citations omitted) (emphasis added). *See also, People v. Berger*, 521 P.2d 1244, 1245 (Colo. 1974); *Wilcox v. People*, 104 P. 408, 409 (Colo. 1909); *Smith v. Farr*, 104 P. 401, 403 (Colo. 1909).

8 *Wuebker v. James*, 58 N.Y.S.2d 671, 677 (Schenectady County Ct. 1944) ("When decisions of the United States Supreme Court are based on a line of judicial precedents which have been accepted as correctly applying constitutional provisions on a subject, they are *entitled to serious consideration and respect* . . . .") (emphasis added).

Id. at 194.

II. The Colorado Supreme Court Violated The Standards Authoritatively Imposed By This Court For The Recognition Of A Fundamental Right

The issue before the court below was whether Amendment 2[9] violated an *existing* constitutional right:

> [W]e independently review the question of whether Amendment 2 has been shown to violate an *existing* constitutional right.

Evans v. Romer, 854 P.2d 1270, 1275 (Colo. 1993) (emphasis added).

According to this Court, the standard used to determine whether a right is fundamental is set forth in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" . . . lies in assessing whether there is a right to education *explicitly or implicitly guaranteed by the Constitution*.

Id. at 33 (emphasis added).

In *Rodriguez*, this Court refused to recognize education as a fundamental right because it failed to meet this standard.

---

9 Amendment 2 provides in pertinent part: "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination." COLO. CONST. art. II, § 30b.

A. The Fundamental Rights Cases Relied Upon By The Court Below Are Irrelevant To This Case

The court below failed to conduct a textual and historical analysis of the Equal Protection Clause of the Fourteenth Amendment as required by *Rodriguez*. Rather it based its decision exclusively upon case "decisions [which] addressed entirely distinct questions and constitutional problems from those presented here." *Evans*, 854 P.2d at 1278. This lack of textual, historical, and authoritative case analysis makes clear that the court below has attempted to create, by fiat, the previously unrecognized "fundamental right to participate equally in the political process."

While the court below does cite fundamental rights cases[10] as authority, the cited cases have been held by this Court to demonstrate only "that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Simply put, the court below cites as support United States Supreme Court cases which recognize only that the right to vote and cast a ballot is constitutionally protected. The court below recognized the narrowness of the voting rights cases and concedes their inapplicability:

> The "precondition," reapportionment, and "candidate eligibility" cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases. Admittedly, those decisions addressed entirely distinct questions and constitutional problems from those presented here.

Evans, 854 P.2d at 1278.

---

10 Reapportionment cases, *see, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); cases concerning minority party rights, *see, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968); cases involving direct restrictions on the exercise of the franchise, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

B. The Court Below Extended The Hunter Doctrine Beyond Suspect Classification In Contravention Of This Court's Explicit Instructions

Aside from the previously mentioned non-dispositive fundamental rights cases, the court below based its holding primarily on *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny.[11] Although the facts of *Hunter* and its offspring resemble the present controversy, those decisions were specifically decided with reference to suspect classifications, they in no way concern the fundamental rights strand of equal protection, and their principles cannot be extended beyond suspect classification.[12]

In *Hunter*, this Court struck down a voter enacted charter amendment preventing the city of Akron from "implementing any ordinance dealing with race, religion, or ancestral discrimination in housing without the approval of the majority of the voters of Akron." *Hunter*, 393 U.S. at 386. This Court defined the aim of the Fourteenth Amendment:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." They bear a far heavier burden of justification than other classifications.

Id. at 391-92 (citations omitted).

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court upheld Article XXXIV of the California Constitution which prohibited the development of low-income housing projects unless approved by a majority of the voters of the state. The lower court in *James* did exactly what the court below has done in this case: both courts improperly extended the

---

11 *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982); *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971).

12 The court below admits "[t]hat gay men, lesbians, and bisexuals have not been found to constitute a suspect class," nor do plaintiffs contend that they qualify as such. *Evans*, 854 P.2d at 1275.

principles of *Hunter* to include non-suspect classifications.[13] This Court reversed the decision and tersely restricted application of the *Hunter* doctrine to suspect classification, saying:

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on *racial minorities* within the governmental process . . . .
>
> . . . .
>
> *The present case could be affirmed only by extending Hunter, and this we decline to do.*

James, 402 U.S. at 140-41 (emphasis added).

Again, in *Gordon v. Lance*, 403 U.S. 1 (1971), this Court upheld a West Virginia state constitutional provision requiring approval of sixty percent of the voters in a referendum election before the state's subdivisions could incur bonded indebtedness. This Court clearly distinguished *Hunter*, explaining that its principles applied only to suspect classes:

> Unlike the restrictions in [*Hunter*], the West Virginia Constitution singles out no "discrete and insular minority" for special treatment . . . . We are not, therefore, presented with a case like Hunter v Erickson . . . .

Id. at 5.

The only United States Supreme Court case cited by the court below which has actually applied the *Hunter* doctrine is *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982). In *Washington*, this Court struck

---

13 The basis of plaintiffs claim in *James* was *identical* to the Colorado Supreme Court's reasoning here. The *James*' plaintiffs "suggest[ed] that the mandatory nature of the Article XXXIV referendum constitute[d] unconstitutional discrimination because it hamper[ed] persons desiring public housing from achieving their objective when no such roadblock face[ed] other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142.

down Initiative 350 which in effect limited the ability of the state to utilize forced busing to achieve racial integration. This Court stated that "[g]iven the *racial* focus of Initiative 350, this suffices to trigger application of the Hunter doctrine." *Id.* at 474 (emphasis in original).

Explaining the nature of *Hunter*, this Court stated:

> Hunter . . . rested on a principle that has been vital for over a century -- that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race*."

Washington, 458 U.S. at 486 (emphasis added).

Surprisingly, the court below held that "the principle articulated in [*Hunter* and *Washington*] clearly is not one that can logically be limited to the 'race' context alone." *Evans*, 854 P.2d at 1281.[14] This blatant abuse of the *Hunter* doctrine usurps federal judicial power by ignoring clear precedent in derogation of the lower court's duty.

Aside from this abuse of power, the court below failed to explain how even an extended *Hunter* doctrine supports the existence of any fundamental right. No authoritative support for such a contention can be found. The words "fundamental right" are not mentioned once in *Hunter*, *James*, *Gordon*, or *Washington*, and the court below cites no authority in which any other court has interpreted these cases as supporting a fundamental right.[15]

---

14 The Colorado Supreme Court defines the *Hunter* principle as one of neutrality. Neutrality, however, cannot be divorced from suspect classifications. *Washington* defines non-neutrality stating: "[T]he state allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decision making process." 458 U.S. at 470 (emphasis in original).

15 Quite to the contrary, the courts have consistently cited *Hunter* as a suspect classification case. *See, e.g., Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986); *Habron v. Epstein*, 412 F.Supp. 256 (D.Md. 1976), *aff'd*, 429 U.S. 802 (1976); *Parker v. Mandel*, 344 F.Supp. 1068 (D.Md. 1972).

Furthermore, it is illogical to use an extended *Hunter* doctrine to support the existence of a fundamental right. If the principles of *Hunter* really do apply to sexual orientation, strict scrutiny would then be triggered upon that basis alone, and the finding of a fundamental right would be unnecessary. Yet the court below went on to insist that an extended *Hunter* doctrine established a fundamental right: the right of identifiable groups to participate equally in the political process.[16]

The Colorado Supreme Court failed to heed the warning of this Court in *Bowers* that a court is "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers*, 478 U.S. at 194. The illegitimate act of the court below was not without its price, and the people of the State of Colorado have borne the cost of this judicial inventiveness.

C. The Decision Of The Colorado Supreme Court Paralyzes The Sovereignty Of The People Of The State Of Colorado

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

COLO. CONST, art. II, § 1.[17]

The right of the people to enact legislation through the initiative process is, in the words of the Colorado Supreme Court, a right "of the first order; it is not a grant to the people but a reservation by them for

---

16 The only explanation for this illogical conclusion is that perhaps the Colorado Supreme Court realized that extension of the *Hunter* doctrine would, in effect, create a third strand of equal protection analysis if it were not somehow "stuffed" into an existing strand of equal protection. Since the Court refuses to admit that it is a suspect class case, the only other basis upon which to employ strict scrutiny is by finding a fundamental right.

17 *See also*, COLO. CONST. art. II, § 2 ("The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.").

themselves." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (citation omitted).[18] "Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." *Id.* (citation omitted).

This Court has acknowledged the paramount importance of the sovereignty of the people. "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976). Although they are subject to the limitations of the federal constitution, "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James*, 402 U.S. 137, 141 (1971). Accordingly, the "Court will not lightly set aside the results of voter referendums." *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 573 (6th Cir. 1986).[19]

The court below, however, "lightly set aside" the results of the voter initiative Amendment 2 by ignoring *Rodriguez*. This Court has forbidden such actions which "discard these fixed principles in favor of a judicial inventiveness that would go 'far toward making this Court a superlegislature.'" *Mobile v. Bolden*, 446 U.S. 55, 76 (1980). As a result, the sovereignty of the people of the State of Colorado has been crippled and their right to limit or control their state government has been paralyzed.

As this Court noted in *Gordon*, 403 U.S. 1 (1971), *James*, 402 U.S. 137 (1971), and *Washington*, 458 U.S. 457 (1982), application of the *Hunter* doctrine must be limited to suspect classes alone, not only because *Hunter* is based exclusively upon suspect classification, but also because there is no other limitation which would prevent the courts from

---

18 COLO. CONST. art. V, § 1 ("The first power hereby reserved by the people is the initiative . . . .).

19 In *Arthur*, the Sixth Circuit Court of Appeals refused to strike down a referendum which plaintiffs claimed had violated the Equal Protection Clause.

granting this right to all "of the diverse and shifting groups that make up the American people." *James*, 402 U.S. at 142.

III. This Fundamental Right To Participate Equally In The Political Process Will Render Suspect Every Legitimate Limitation Upon The Power Of The Legislature

According to the Colorado Supreme Court, "Amendment 2 singles out and prohibits this class of persons [homosexuals, lesbians, and bisexuals] from *seeking governmental action favorable* to it and thus, from participating equally in the political process." *Evans*, 854 P.2d at 1285 (footnote omitted) (emphasis added).

Seeking favorable governmental action is an extraordinarily widespread practice. The political landscape of America is littered with interest groups whose very existence is predicated upon obtaining legislation favorable to the group of persons which they represent. If "any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny," *Evans*, 854 P.2d at 1282 (footnote omitted), then all limitations upon legislative power which burden an identifiable group's ability to obtain favorable legislation would be suspect.

Failure to review now the decision of the court below will lend weight to an already dangerous precedent. A state could be forced to eliminate numerous "barriers" to the enactment of legislation regardless of how legitimate the limitation may be.

This Court expressed this same concern in *James* where the plaintiffs had relied upon *Hunter*.[20] This Court responded by stating:

---

20 Plaintiffs in *James* asserted the same argument which has been set forth by the plaintiffs in this case. The *James*' plaintiffs "suggest[ed] that the mandatory nature of the Article XXXIV referendum constitut[ed] unconstitutional discrimination because it hamper[ed] persons desiring public housing from achieving their objective when no such roadblock face[d] other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142.

> [A] lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding . . . . [T]his Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

James, 402 U.S. at 142.

Likewise, in *Gordon*, 403 U.S. 1, this Court refused to extend *Hunter* beyond suspect classification and upheld a West Virginia Constitutional provision which limited the ability of the state's subdivisions to incur bonded indebtedness. This Court noted the fact that "[t]he constitutions of *many* States prohibit or severely limit the power of the legislature . . . ." *Id.* at 6 (emphasis added). Such matters are *"more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment." Id.* (emphasis added).

The decision of the Colorado Supreme Court sets a dangerous precedent that is unlimited in its applicability.[21] The scope of the decision is

---

21 This Court has expressed this same fear in other cases as well. *See Jefferson v. Hackney*, 406 U.S. 535, 548-49 (1972) (citing *James*, this Court stated: "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the . . . classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment."); *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971) (where this Court refused to recognize the "fundamental right" to equal group representation and stated: "[Such a] holding . . . is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls . . . . This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . . At the very least, [such a holding] would spawn endless litigation concerning the multi-member district systems now widely employed in this country."); *Mobile v. Bolden*, 446 U.S. 55, 77 (1980) (where this Court refused to recognize the "fundamental right" to participate equally in the political process, citing *Whitcomb*, 408 U.S. 124, and *Dunn*, 405 U.S. 330, and stated: "But this right to equal participation in the political process does not protect any 'political group' from

incredibly broad because the term "identifiable class" is virtually unrestricted and includes all groups organized on the basis of behavior. In contrast, suspect classification previously provided a logical, "bright line" limitation on the *Hunter* doctrine.[22]

The court below, perhaps recognizing the dangerous potential of its own decision, made a futile attempt to limit[23] the scope of its holding. The lower court attempted to restrict the definition of "independently identifiable class" while still including homosexuals, lesbians and bisexuals. Without any elaboration, the Colorado Supreme Court simply found the limitation set forth in *Gordon*, 403 U.S. 1, "both controlling and persuasive here." *Evans*, 854 P.2d at 1284.

The limitation set forth in *Gordon*, however, cannot be understood apart from the contrasts and distinctions this Court was making.[24]

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. We are not, therefore, presented with a case like Hunter v. Erickson . . . .
>
> The class singled out in Hunter was clear -- "those who would benefit from laws barring *racial, religious, or ancestral discriminations*." In contrast we can discern no independently identifiable group or category

---

electoral defeat."); *Parker v. Mandel*, 344 F.Supp. 1068, 1079 (D.Md. 1972) ("To hold that the strict scrutiny test applies to legislation of this sort would be to render automatically suspect every statutory classification made by state legislatures . . . .").

22 Suspect classification is *the* limitation because it is a definite standard; it is also a *logical* limitation because unequal and burdened participation in the political process is a factor which suspect classes must demonstrate to gain such status. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587 (1987). Thus, the rights of those actually burdened remain protected.

23 Holding that a fundamental right is applicable only to certain groups is contrary to the very nature of a fundamental right. If the right is so "fundamental," certainly all should be entitled to its protection. This observation compels the court to recognize that *Hunter* is based on suspect classification as opposed to fundamental rights.

24 The opinion of the court below begins quoting *Gordon* in the middle of the paragraph at "In contrast . . . ," *Evans*, 854 P.2d at 1284, without indicating the contrast *Gordon* was attempting to make.

> that favors bonded indebtedness over other forms of financing.

Gordon, 403 U.S. at 5 (citations omitted) (emphasis added).

The distinction *Gordon* makes is between racial or ancestral groups on the one hand, and groups which are not organized on the basis of race or ancestry on the other. Hence, *Gordon* clearly limits the *Hunter* doctrine to suspect classification.[25]

Aside from this misplaced reliance upon *Gordon*, the court below set forth no limitations and no criteria for recognizing what constitutes an "independently identifiable group."[26] Extending application of the *Hunter* doctrine outside of suspect classification and including groups organized on the basis of behavior,[27] such as homosexuals, bisexuals,

---

25 Race and ancestry are the only two truly "suspect classes" recognized by this Court.

26 The only meaningful distinction which *Gordon*, 403 U.S. 1, makes is that of suspect classification. Certainly there are "groups or categories that [favor] bonded indebtedness over other forms of financing," *Id.* at 5, but the distinction which *Gordon* makes is that there are no "*suspect classes*" which favor bonded indebtedness over other forms of financing. Except for this line separating suspect classifications from non-suspect classifications, there is no standard set forth in *Gordon* which separates "independently identifiable groups" (groups entitled to the fundamental right to participate equally in the political process) from non-"independently identifiable groups," (those not entitled to the fundamental right). Even if, as the Colorado Supreme Court believes, *Gordon* does not restrict application of the *Hunter* doctrine to suspect classes, there is no other meaningful limitation which can be found in *Gordon*. If the distinction in *Gordon* was not drawn on the basis of "suspect class," the Court in *Gordon* merely held that in this particular situation they could find no "independently identifiable class." *Gordon* then holds only that there is no "independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5. That is an extremely limited holding which does not exclude other "shifting and diverse groups of the American population" from the definition of "independently identifiable group."

27 This Court has clearly held that sexual orientation "is primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *See also, Steffan v. Cheney*, 780 F.Supp. 1 (D.D.C. 1991) and *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (1990).

and lesbians "will provide the basis to attack a wide range of routine federal and state legislation."[28]

Homosexuals, bisexuals, and lesbians are groups which are, in a legal sense, organized on the same basis as any other political group. By pretending that gay men, lesbians, and bi-sexuals are a "so-called" "identifiable group" which can somehow be distinguished from other groups organized on the basis of behavior, the Colorado Court's decision grants, whether by design or inadvertence, suspect classification to "sexual orientation." This is contrary to *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (1990).[29]

IV. The Judgment Of The Colorado Supreme Court Is Final

Since the early history of this Court, the Court's decisions have recognized certain exceptions to the final judgment rule of 28 U.S.C. §1257(a). *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 125 n.2 (1945). This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), categorized these exceptions. The first category encompassed cases in which the federal issue was "conclusive or the outcome of further proceedings preordained" although state proceedings, including entire trials, were yet to occur." *Id.* at 479.[30]

The case at hand is closely analogous to two particular U.S. Supreme Court category one cases.[31] In those comparable cases, this Court granted certiorari.

---

28 Petitioners Brief at 13.

29 *See also*, *Steffan v. Cheney*, 780 F.Supp. 1, 7 (D.D.C. 1991); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

30 Category two included cases in which the federal question(s) would survive subsequent state court proceedings regardless of the outcome and was premised upon the fact that no other federal issues would arise in such proceedings. *Cox Broadcasting Corp.*, 420 U.S. at 480. This category has been argued to be the original historical exception to the final judgment rule. *See Johnson*, 326 U.S. at 126-27.

31 For additional category one cases that are similar to the following two cases ,*see American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 419 U.S. 215 (1974)

In *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), a trial court, had sustained a general demurrer to the request for an injunction, but the Georgia Supreme Court reversed dismissing the petitioner's federal defense under a federal statute. The U.S. Supreme Court determined[32] that the state supreme court's judgment was final because the Georgia Supreme Court's decision, interpreting an important federal statute, was in conflict with U.S. Supreme Court decisions and the petitioner had no other defense. *Id.* at 381-82. These two reasons made the "federal question . . . the controlling question." *Id.* at 382.[33]

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court held[34] that it had jurisdiction to hear the case even though a state appellate court had only affirmed the trial court's grant of a temporary injunction against leafleting and picketing. This Court stated that "[a]though the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case." *Id.* at 418 n.* (citations omitted). In light of that standard, it was crucial to the Court that the temporary injunction had been in effect for over three years holding the First Amendment rights of the petitioners hostage. *Id.*

---

and *Construction & Gen. Laborers' Union, Local 438 v. Curry*, 371 U.S. 542 (1963).

32 Only Justice Reed thought that the court's decision with regard to finality was wrong. *See Pope*, 345 U.S. at 387.

33 *See also, Mills v. State of Alabama*, 384 U.S. 214 (1966) (the trial court sustained demurrers to the complaint based on state and federal constitutional rights of free speech and press, but the state supreme court reversed despite that the petitioners had no other defenses and only Justice Harlan disagreed that the judgment was not final).

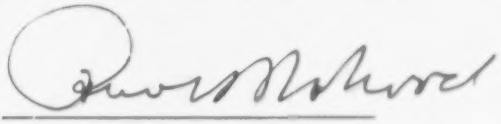
34 Although the decision was not unanimous, Justice Harlan's lone dissent was not based on the fact that the judgment was not final. Rather, Justice Harlan's dissent was based on the fact that the final judgment was not "rendered by the highest court of a State in which a decision could be had" as required by 28 U.S.C. § 1257. *See Keefe*, 402 U.S. at 420-23. Thus, on the issue of finality, this decision was unanimous.

Similarly, the court below decided an important federal question[35] and its decision is in conflict with U.S. Supreme Court decisions as in *Pope*. The petitioner-defendants have no other defense except to meet the burden of proving a compelling state interest. The judgment below is analogous to *Keefe* because there is no indication when the process of litigation regarding Amendment 2 will end. The preliminary injunction has already been in effect for over nine months,[36] and with the trial on the merits under way at the time of this writing and another state appeals process to come (regardless of the trial court's ruling), it is very probable that the injunction will be in effect for several years before a final decision is rendered. All the while, the sovereign power of the people of the State of Colorado is crippled.

V. Conclusion

The Colorado Supreme Court usurped federal judicial power in contravention of their duty, paralyzed the sovereignty of the people of the State of Colorado, and set a dangerous precedent that has no limits. The judgment is final.

Respectfully submitted this 22nd day of October, 1993.



Robert K. Skolrood
Attorney for Amicus Curiae

---

35 How state courts construe the Equal Protection Clause of the 14th Amendment is of great import.

36 The preliminary injunction was granted on January 15, 1993.